

ORDINANCE NO. 026

AN ORDINANCE WHEREBY THE **CITY OF HIGHLAND HAVEN**, TEXAS, AND GTE SOUTHWEST INCORPORATED AGREE THAT, FOR THE PURPOSE OF OPERATING ITS TELECOMMUNICATIONS BUSINESS, THE **TELEPHONE COMPANY** SHALL, CONSTRUCT, ERECT, BUILD, EQUIP, OWN, MAINTAIN AND OPERATE IN, ALONG, UNDER, OVER AND ACROSS, THE STREETS, AVENUES, ALLEYS, BRIDGES, VIADUCTS, AND PUBLIC GROUNDS OF THE **CITY**, SUCH POSTS, POLES, WIRES, CABLES, CONDUITS AND OTHER APPLIANCES, STRUCTURES AND FIXTURES NECESSARY OR CONVENIENT FOR RENDITION OF TELECOMMUNICATIONS SERVICES IN SAID **CITY** AND FOR CONDUCTING A GENERAL LOCAL AND LONG-DISTANCE TELEPHONE BUSINESS, PRESCRIBING THE CONDITIONS GOVERNING THE USE OF PUBLIC RIGHTS-OF-WAY FOR THE **TELEPHONE COMPANY'S** TELECOMMUNICATIONS BUSINESS, PRESCRIBING THE QUARTERLY COMPENSATION DUE THE **CITY** UNDER THIS ORDINANCE; PROVIDING AN INDEMNITY CLAUSE; SPECIFYING GOVERNING LAWS; PROVIDING FOR ASSIGNMENT; PRESCRIBING THE TERM AND EFFECTIVE DATE OF SAID AGREEMENT; PROVIDING FOR NOTICE; PROVIDING FOR BINDING EFFECT; PROVIDING THAT THE ORDINANCE BE CUMULATIVE; PROVIDING FOR GOVERNMENTAL IMMUNITY; PROVIDING FOR CONSENT AND ACCEPTANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR CHOICE OF LAW AND VENUE; FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW; PROVIDING FOR FUTURE CONTINGENCIES; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR RELEASE OF ALL CLAIMS UNDER PRIOR ORDINANCES; PROVIDING FOR ALTERNATE DISPUTE RESOLUTION; AND PROVIDING FOR METHOD OF ACCEPTANCE.

WHEREAS, it is to the mutual advantage of both the City of Highland Haven ("**City**") and GTE Southwest Incorporated ("**Telephone Company**") that an agreement should be entered into between the **Telephone Company** and the **City** establishing the consideration for and conditions under which the **Telephone Company** shall construct, maintain and operate its physical plant in the public rights-of-way within the **City's** corporate limits in the future;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF HIGHLAND HAVEN, TEXAS, THAT:

SECTION 1. DEFINITIONS

Whenever used in this Ordinance, the following words and terms shall have the definitions and meanings provided in this section:

(a) **ACCESS LINES:** For purposes of this Ordinance, an Access Line shall be defined as any local line provided by **Telephone Company** to a customer in the City which provides access to the public switched network, including all single line residence lines, party line residence lines, single line business lines, multi-line business lines, key lines, ISDN lines, COCT lines, semi-public pay telephone lines, and Centrex trunks, Centranet trunks and PABX trunks or their equivalents which are assigned to locations inside the corporate limits of the **City**.

(b) **CITY:** The **City of Highland Haven**, Texas.

(c) **FACILITIES:** All **Telephone Company** duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures and appurtenances and all associated Transmission Media, which are located in the **City** Rights-of-Way.

(d) **PUBLIC RIGHTS-OF-WAY:** All present and future public streets, avenues, highways, alleys, bridges, viaducts, public thoroughfares, public utility easements, public ways, public grounds, and without limitation by the foregoing enumeration, other public property within the city limits of the **City**. As used herein, the term "Rights-of-Way" does not include facilities dedicated to the provision of electrical power to citizens of the **City** to the extent the **City** may own the power utility providing electrical power in the **City**. A public right-of-way does not include the airways above a public right-of-way with regard to cellular or other non-wire telecommunications or broadcast services.

(e) **TELECOMMUNICATIONS OR TELECOMMUNICATIONS SERVICES:** All services of any nature, offered for sale by the **Telephone Company** to subscribers in the **City**, which services are delivered to such subscribers by transmission, between or among points not specified by the **Telephone Company**, of information, voice or otherwise, not chosen, created, or offered for distribution by the **Telephone Company**, transmitted without change in form or content of the information as sent and received, which transmission is offered for sale by the **Telephone Company** in the **City**, which services are provided in whole or part in the **City** to any customers of any type whatsoever. "Telecommunications" and "Telecommunications Services" do not include such services as cable services, as that term is defined in the Cable Communications Policy Act of 1984 (47 U.S.C.A. §521, *et seq.*, amended) or as recognized by the Federal Communications Commission or any other service wherein content is selected for distribution by the **Telephone Company**.

(f) **TELEPHONE COMPANY:** GTE Southwest Incorporated.

(g) **TRANSMISSION MEDIA:** All **Telephone Company** cables, fibers, wires or other physical devices used to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice, video, or data or other purposes, which are physically located in the **City** Rights-of-Way.

SECTION 2. CONSTRUCTION AND MAINTENANCE OF TELEPHONE PLANT AND SERVICE

(a) Pursuant to the laws of the State of Texas and this Ordinance, the **Telephone Company** has the nonexclusive right and privilege to use and occupy the public rights-of-way in the **City** for the purpose of maintaining and operating its Transmission Media used in the provision of Telecommunications Services and the operation of a telecommunications system, subject to the terms, conditions, and stipulations set forth in this Ordinance, the Constitutions and laws of the United States and the State of Texas and the City's Ordinances to the extent such Ordinances are not in conflict herewith. The **Telephone Company** is not authorized to provide cable television service as a cable operator, as that term is defined in the Cable Communications Policy Act of 1984, in the City without obtaining a separate franchise from the City. The **Telephone Company's** Facilities and Transmission Media used in or incident to the provision of Telecommunications Services and to the maintenance of a telecommunications business by the **Telephone Company** in the **City** shall remain as now constructed, subject to such changes as under the conditions prescribed in this Ordinance may be considered necessary to the public health and safety by the City in the exercise of its lawful police powers and such changes and extensions as may be considered necessary by the **Telephone Company** in the pursuit of its telecommunications business. The **Telephone Company** shall at all times during the term of this Ordinance be subject to all lawful exercise of the police power by the City and to such reasonable and lawful regulation as the City shall hereafter by resolution or ordinance provide. The terms of this Ordinance shall apply throughout the **City** and shall apply to all the **Telephone Company's** Facilities used, in whole or part, in the provision of Telecommunications Services, and shall include the provision of Telecommunications Services in any newly annexed areas of the City upon the effective date of such annexation or the date the **City** provides the **Telephone Company** notice of such annexation, whichever occurs later. The Telephone Company shall maintain its Facilities in a reasonable operating condition at all normal times during the term or any extension of this Ordinance. An exception to this condition is automatically in effect when service furnished by the **Telephone Company** is interrupted, impaired or prevented by fires, strikes, riots, or other occurrences beyond the control of the **Telephone Company**, or by storms, floods, or other casualties, in any of which events the **Telephone Company** shall do all things reasonably within its power to do to restore normal service as soon as practicable.

(b) Facilities installed or relocated by the **Telephone Company** in the Rights-of-Way during the term of this Ordinance shall be located on existing telephone poles or underground where technologically and economically feasible. If technologically unfeasible, or if placement of facilities underground presents an undue economic burden on Telephone Company, upon proof thereof being presented to the City, Telephone Company and City will jointly agree to alternative installation of relocation options.

SECTION 3. SUPERVISION BY CITY OF LOCATION OF POLES AND CONDUITS

(a) The **Telephone Company** shall lay, maintain, construct, operate, and replace its poles, wires, anchors, cables, manholes, conduits, and appurtenances used, in whole or part, to provide Telecommunications Services so as to interfere as little as possible with traffic and shall promptly clean up and restore, at its sole cost, all thoroughfares and other surfaces which it may disturb to as good a condition as before such disturbance. The location of all **Telephone Company** Facilities shall be fixed under the supervision of the City's governing body or an authorized committee or agent appointed by said governing body. All poles to be placed shall be of sound material and reasonably straight, and all poles, stubs, guys, anchors, and other above ground facilities shall be so set that they will not interfere with the flow of water in or to any gutter or drain, and so that the same will interfere as little as practicable with the ordinary travel on the streets, alleys, highways, public thoroughfares, public utility easements, public ways or sidewalks and so that they will not compromise public safety. The City shall have the right to require the **Telephone Company** to install or relocate aboveground Facilities as far from vehicular travel lanes as reasonably possible for traffic safety purposes. Except as provided in Section 2(b), the City shall also have the right to require the **Telephone Company** to install underground all new Facilities except those to which aboveground access is necessary for normal maintenance and connections, without claim for reimbursement or damages against the **City**. The location and route of all poles, stubs, guys, anchors, conduits, cables and any other Facilities to be placed and constructed by the **Telephone Company** in the **City** Rights-of-Way, and the location of all conduits to be laid by the **Telephone Company** within the **City's** Rights-of-Way under this Ordinance, shall be subject to the reasonable and proper regulation, control and direction of the **City's** governing body or of any **City, Committee, department or** official to whom such duties have been or may be delegated.

(b) The **City** shall have the right to change the grade, install, relocate, or widen the public streets, sidewalks, bikeways, alleys, public thoroughfares, highways, landscaping, and public way and places within the present limits of the **City** and within said limits as same may from time to time be extended, and in such events the **Telephone Company** shall relocate, at its own expense, its Facilities and Transmission Media, in order to accommodate the installation, relocation, widening, or changing of the grade of any such public street, sidewalk, bikeway, alley, public thoroughfare, highway or public ways, including if necessary relocating such Facilities and Transmission Media a sufficient distance from the edge of the pavement to permit a reasonable work area for machinery and individuals engaged in installing, relocating, widening, or changing the grade of any public street, sidewalk, bikeway, alley, public thoroughfare, highway or public way.

(c) The **City** shall have right to lay, and permit to be laid, sewer, gas, water, electric, and other pipelines or cables or conduits, and to do and permit to be done any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the **City** in, across, along, over or under any City Rights-of-Way occupied by the **Telephone Company**, and to change any curb or sidewalk or the grade of any street. In permitting

such work to be done, the **City** shall not be liable to the **Telephone Company** for any damage so caused, nor shall the **City** be liable to the **Telephone Company** for any damages arising out of the performance by the **City** or its contractors or subcontractors not negligently and unnecessarily occasioned; provided, however, nothing herein shall relieve any other person or corporation from liability for damages to facilities of the **Telephone Company**, including the **City's** contractors and subcontractors. The **City** shall also have the right to require the **Telephone Company** to relocate any Facilities erected or maintained in **City** Rights-of-Way, if said relocation is deemed necessary by the governing body or its designated representative for traffic safety purposes, including traffic signals. Whenever by reason of changes in the grade of a thoroughfare or in the location or manner of constructing a water pipe, gas pipe, sewer, or other aboveground or underground structure, it is deemed necessary by the **City** to remove, alter, change, adapt, or conform the underground or aboveground Facilities of the **Telephone Company**, the **Telephone Company** shall make the alterations as soon as practicable when ordered in writing by the **City**.

(d) Whenever it becomes necessary to require **Telephone Company** to relocate or remove Facilities, for the completion of public works projects or for reasons of public safety, the **City** will inform the **Telephone Company** in writing of the aforementioned requirement. Except in cases of an emergency, the **City** will provide at least ten (10) days' written notice to Telephone Company of the requirement to relocate or remove said Facilities. Whenever it shall be necessary to require **Telephone Company** to alter, change, adapt, relocate or conform its Facilities within the Rights-of-Way, such alterations or changes shall be made promptly, with consideration given to the magnitude of such alterations or changes, without claim for reimbursement or damages against the **City**. If any such requirements impose a financial hardship upon the **Telephone Company**, the **Telephone Company** shall have the right to present alternative proposals to the **City**, and the **City** shall give due consideration to any such alternative proposals. If the **City** requires the **Telephone Company** to adapt or conform its Facilities to enable any other entity or person, except the **City** (as described in Section 3(c) above), to use, or to use with greater convenience, Rights-of-Way or public property, **Telephone Company** shall not be required to make any such changes until such other entity or person shall reimburse or make arrangements satisfactory to **Telephone Company** to reimburse the **Telephone Company** for any loss and expense caused by or arising out of such change; provided, however, that in no event shall the **City** be liable for such reimbursement. If relocation is requested at the behest of or for the benefit of a nongovernmental entity, said entity shall bear the cost of the requested relocation.

Nothing in this Ordinance is intended to add or to detract from any authority granted by federal or state law to the **City** or the **Telephone Company**.

SECTION 4. ATTACHMENTS TO POLES AND SPACE IN DUCTS

Nothing contained in this Ordinance shall obligate or restrict the **Telephone Company** in exercising its rights voluntarily to enter into pole attachment, pole usage, joint ownership or other wire space or facilities agreements with light and/or power companies or with other companies utilizing wire transmission of services which are authorized to operate within the **City**. Further, nothing contained in this Ordinance shall preempt any pole attachment agreement between the **City** and **TELEPHONE COMPANY** wherein **TELEPHONE COMPANY** or **City** agrees to pay the other a fee to place its facilities on a utility pole owned by the other.

SECTION 5. RIGHTS-OF-WAY TO BE RESTORED TO GOOD CONDITION

The **Telephone Company** shall restore the surface of any and all Rights-of-Way within the **City** disturbed by the **Telephone Company** in building, constructing, renewing, or maintaining its Facilities or Transmission Media within a reasonable time after completion of the work to at least as good a condition as before commencement of the work and in compliance with the applicable provisions of the Code of Ordinances of the **City** and shall further maintain the work to the satisfaction of the **City's** governing body, or of any **City** official to whom such duties have been or may be delegated, for a period of one (1) year following completion of the restoration, after which time responsibility for the maintenance shall revert to the **City**. During that one (1) year period, the **Telephone Company** shall be responsible for all maintenance costs incurred as a result of any defects, impairments or substandard condition in the Rights-of-Way caused by the construction, maintenance or restoration work of the **Telephone Company**. The **Telephone Company** shall comply with all reasonable rules and regulations of the **City** relative to street excavations, and permits therefor; provided that **Telephone Company** shall not be required to pay any fees required by such rules, regulations and permits. No such Rights-of-Way shall be encumbered for a longer period than shall be necessary to execute the work.

The **Telephone Company** shall submit, in a format prescribed by **City** and reasonably related to the purpose here stated, information describing the general nature, location, and estimated duration of any activity which will result in the disturbance of any Rights-of-Way. The **Telephone Company** shall not be required to divulge proprietary or confidential information in such submission. Proprietary or confidential information may include, but is not limited to, type and size of Facility and sub-routes onto private property. This information shall be submitted prior to the activity except in the case of emergencies, in which case the information shall be submitted as soon as practical. This information requirement shall not apply to the **Telephone Company's** installation of service wires serving a single residence or business. When the **Telephone Company** shall make or cause to be made excavations, or shall place obstructions in any street, alley, highway, public thoroughfare, public utility easement or public way, the **Telephone Company** shall protect the public by barriers and lights placed, erected and maintained by the **Telephone Company**.

SECTION 6. TEMPORARY REMOVAL OF AERIAL WIRES

The **Telephone Company** on the request of any person shall remove or raise or lower its wires within the **City** temporarily to permit the moving of houses or other bulky structures. The expense of such temporary removal, raising or

lowering of wires shall be paid by the benefitted party or parties, and the **Telephone Company** may require such payment in advance. The **Telephone Company** shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire changes. The clearance of wires above ground shall conform to the basic standards of the National Electrical Safety Code, National Bureau of Standards, United States Department of Commerce, as promulgated at the time of erection thereof.

SECTION 7. TREE TRIMMING

In the pursuit of maintaining its telecommunications system, the **Telephone Company**, its contractors, agents, successors and assigns shall have the right to trim trees upon and overhanging the Rights-of-Way within the **City**, so as to prevent the branches of such trees from coming in contact with the wires, cables, or other Facilities of the **Telephone Company**.

SECTION 8. RIGHTS-OF-WAY MANAGEMENT

(a) The **City** has exclusive responsibility for regulating the use of its Rights-Of-Way. In consideration of the compensation received for the use of its Rights-Of-Way, the **City** will make every reasonable effort to ensure that the rights of all authorized users of the Rights-Of-Way are adequately protected. In the granting of consent, franchises, and permits for the use of public streets, alleys or Rights-Of-Way within its corporate municipal limits, the **City** will require all grantees to adhere to all requirements as may be provided by the **City** in any ordinance, law or regulation regarding prevention and/or avoidance of damage to other entities which have facilities in **City** Rights-of-Way.

(b) **City** to the fullest extent permitted by law, including the Texas Tort Claims Act, will indemnify and hold harmless **Telephone Company**, its directors, officers, agents, and employees, against any and all claims, losses, penalties, damages, expenses, causes of action, suits, and liability of every kind, including all reasonable expenses of litigation, court costs, and attorney fees, arising out of damage, breakage, or dislocation of Facilities or disruption of services caused by the negligence or intentional acts or omissions of **City** employees.

SECTION 9. COMPENSATION TO THE CITY

(a) As compensation for the **Telephone Company's** use and occupancy of the **City's** Rights-of-Way and for the **City's** oversight, regulation and supervision of such use and occupancy, in consideration for all other agreements and promises made herein by the **City** and in lieu of and in full compensation for any lawful tax, license, charge, right-of-way permit fee or inspection fee, whether charged to the **Telephone Company** or its contractor(s), or any right-of-way easement or street or alley rental or corporate franchise tax or other character of charge for the use and occupancy of the Right-of-Way within the **City**, except the usual general ad valorem taxes and special assessments in accordance with State law, and sales taxes now or hereafter levied by the **City** and in accordance with State law, the **City** hereby imposes upon the **Telephone Company** and the **Telephone Company** agrees to pay, an annual fee (the "Annual Fee"), such Annual Fee to be paid in quarterly installments as set forth in Section 9(b) herein. The Annual Fee shall comprise the sum of the Access Line fees billed monthly to customers residing within the corporate limits of the **City** during each twelve month period of this Ordinance("Contract Year"). The Access Line fee shall be **\$0.50** per month per Access Line(for a total of \$6.00 per Access Line for such twelve month period) for each residential (non-Centranet) Access Line, **\$1.00** per month (for a total of \$12.00 per Access Line for such twelve month period) for each business (non-Centranet) Access Line and **\$1.00** per month (for a total of \$12.00 per Access Line for such twelve month period) for each Centranet Access Line. An Access Line fee shall be billed for each Access Line and remitted to the City upon receipt as set forth above. The Access Line fee will be prorated based upon the number of days during the billing month the customer has service.

(b) The amount paid to the **City** will equal the aggregate amount of Access Line fees billed by the **Telephone Company** according to the method described above through the end of each calendar quarter. The payment due dates shall be February 28, May 31, August 31, and November 30 of each Contract Year this Ordinance remains in effect. The first payment under this Ordinance shall be due on November 30, 1997. The Board of Aldermen reserve the right to propose increases or decreases in the Access Line fee each year during the month of November. Any change made in the Access Line fee will become effective on January 01.

(c) The Ordinance may, by mutual consent, be extended in writing for an additional five years. Any such extension cannot be made by City without the Board of Aldermen first holding a public hearing concerning the proposed extension.

(d) The **Telephone Company** and the **City** agree that the accuracy of the Access Line count is important to both parties. To satisfy any audit responsibilities the City may have, the **Telephone Company** agrees to provide the **City** a reconciliation report of Access Lines and a Customer Service Address List, which report and list shall be in a format and in sufficient detail to enable the **City** to verify the accuracy of the calculation of the Access Line count and type of local access service (e.g., single party residence line, ISDN line, Centranet trunk or PABX trunk) provided to customers located in the **City**. The parties agree to limit **Telephone Company's** responsibility to produce such reports to two occasions during the term of this Ordinance. One such occasion shall occur during the third year of the Ordinance. **City** reserves the right to determine the other occasion for which such information shall be made available by **Telephone Company** for inspection. **City** agrees to provide reasonable notice beforehand of each such request for inspection. The parties contemplate that reports produced by **Telephone Company** will be as of September 30th of the year in which inspection is requested. The **Telephone Company** will provide a report containing a summary of residence and business Access Lines within the **City** and the gross amount of Access Line Fees billed customers with each quarterly remittance. The report shall include the number of Access Lines as of the end of each month in the calendar quarter being reported, as such data is maintained in **Telephone Company's** REVUNIT database, or any successor database.

The Customer Service Address List shall not include any customer names or telephone numbers. If the **City** becomes aware of information that affects the accuracy of such List, **City** shall promptly inform the **Telephone Company**, and **Telephone Company** shall review such information and, on verification, correct the Customer Service Address List, and Access Line count. **City** accepts and agrees that the Customer Service Address List and Access Line count are proprietary and the exclusive property of the **Telephone Company**, and agrees to return both the Customer Service Address List and Access Line count report, and any data copied or taken therefrom in any form, to the **Telephone Company** within sixty days of its receipt of such List or report, unless such time is extended by the written agreement of the parties. As the Customer Service Address List is the exclusive property of the **Telephone Company**, the **City** agrees not to release any information contained in that List to anyone unless ordered to do so by a court of competent jurisdiction.

(e) The compensation provided for herein constitutes reasonable compensation for the consideration granted to the **Telephone Company** herein.

(f) Payment of the "Annual Fee" shall not relieve the **Telephone Company** from paying all applicable municipally-owned utility service charges, ad valorem and sales taxes adopted by the city.

(g) In the event that either (1) territory within the boundaries of the **City** shall be disannexed and a new incorporated municipality created which includes such territory or (2) territory shall be consolidated or annexed into the **City**, then notwithstanding any other provision of this Ordinance, the Annual Fee shall be adjusted, effective on the effective date of the annexation. To accomplish this adjustment, within sixty (60) days following the action effecting a disannexation/annexation as described above, the **City** shall provide the **Telephone Company** with maps of the affected area(s) showing the new boundaries of the **City**. If the **City** fails to timely provide the maps of the affected areas, then the fees from such additional Access Lines will not become payable to **City** until sixty (60) days after receipt by **TELEPHONE COMPANY** of such maps from the **City**.

(h) In the event of an annexation or disannexation as described above, the Annual Fee paid to the **City** will be adjusted based on the **City's** gain or loss of Access Lines using the same methodology prescribed in section 9(a) above. The effective date of the adjustment shall be the same as the effective date of the annexation/disannexation action by the **City**, provided that the **City** has supplied the appropriate annexation/disannexation maps to the **Telephone Company** in accordance with the provisions herein. The **City** agrees to reimburse the **Telephone Company** for any portion of any Annual Fee that may have been paid to the **City** after the effective date of a disannexation but prior to the receipt by **Telephone Company** from **City** of notice of such disannexation.

(i) In the event a regulatory agency of the State, or court of competent jurisdiction finds that the Access Line fee compensation methodology contained in Section 9(a) of this Ordinance is invalid or unenforceable, then for the remainder of the term of this Ordinance or until such time as the parties agree to another compensation methodology, whichever occurs first, **Telephone company** agrees to pay annual compensation under this Ordinance to **City** in an amount equal to the total of the previous four quarterly payments, such compensation to be paid in quarterly installments and if necessary prorated from the date of such Order of the regulatory agency or court.

SECTION 10. SUCCESSORS AND ASSIGNS

The rights, powers, limitations, duties and restrictions herein provided for shall inure to and be binding upon the parties hereto and upon their respective legal and *bona fide* representatives, successors and assigns.

SECTION 11. PERIOD OF AGREEMENT

This agreement shall be in full force and effect for the period beginning with the effective date hereof and ending five (5) years after such date. This Ordinance may be extended for an additional five (5) years if mutually agreed to in writing by both parties and such extension is approved by the Board of Aldermen of the City of Highland Haven as set forth in Section 9(c) herein.

SECTION 12. FUTURE CONTINGENCIES

Notwithstanding anything contained in this Ordinance to the contrary, in the event that this Ordinance or any section, sentence, clause, phrase, or part thereof, providing any compensation due the **City** under this Ordinance, becomes, is held to be, or is declared or determined by judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unconstitutional, unlawful, invalid or otherwise inapplicable, in whole or in part, the **Telephone Company** and the **City** shall meet and negotiate in good faith to obtain a new ordinance that is in compliance with the authority's decision or enactment and in which the **Telephone Company** shall pay to **City** a reasonable but constitutional and valid compensation.

SECTION 13. GOVERNING LAW AND VENUE

(a) This Ordinance shall be construed in accordance with the law of the State of Texas and the **City** Ordinances in effect on the date of passage of this Ordinance to the extent that such Ordinances are not in conflict with or in violation of the Constitution and laws of the United States or of the State of Texas.

(b) Venue for any dispute arising under this Agreement shall be in Burnet County, Texas.

(c) This Ordinance shall be construed and deemed to have been negotiated at arms length and drafted by the combined efforts of the **City** and the **Telephone Company**.

SECTION 14. DISPUTE RESOLUTION

(a) Notwithstanding any other provision of this Ordinance, the Parties hereto agree that any claim, cause of action or other dispute based upon or arising out of this Ordinance (a "dispute") shall be conducted, decided, determined and/or resolved pursuant to and in accordance with the provisions of this Section. The parties desire to resolve disputes arising out of this Ordinance without litigation. Accordingly, in the event of any dispute hereunder, the Parties hereto agree to attempt in good faith to resolve their dispute between themselves. Within ten (10) days after receipt of the written request of a party, each party will appoint a knowledgeable, responsible representative or representatives to meet and negotiate in good faith to resolve any dispute arising under this Ordinance. The parties' representatives will meet within ten (10) days after the appointment of such representatives and negotiate in good faith to resolve any such dispute.

(b) Except for action seeking a temporary restraining order or injunction related to the purposes of this Ordinance, or suit to compel compliance with this dispute resolution process, the parties agree to use the following alternative dispute resolution procedure, and also agree not to sue any party to this Ordinance with respect to controversy or claim arising out of or relating to this Ordinance or its breach prior to exhausting the procedures set out in this section.

(c) If the parties are unable to settle their dispute at the meeting of representatives provided for in subsection (a), either party may, on written notice to the other party, initiate non-binding mediation of the dispute before a single mediator affiliated with Judicial Arbitration and Mediation Services, Inc. (JAMS) or another mediation service mutually agreeable to the parties. Mediation is a forum in which an impartial person, the mediator, facilitate communication between the Parties to promote reconciliation, settlement, or understanding among them. A mediator may not impose his own judgment on the issues for that of the parties. Unless expressly authorized by the parties, the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during mediation, are confidential and shall be inadmissible as settlement discussion pursuant to Rule 408 of the Federal Rules of Evidence or the applicable state rules. The mediator shall be selected by agreement of the parties within thirty (30) days after either party first requests mediation of the other. If a single mediator cannot be agreed upon, then each party shall select its own mediator from those on the JAMS approved list; those two mediators will then select a third independent mediator who will conduct the mediation session(s). The mediator's fees will be borne equally by both parties. In the event mediation is requested, any applicable statutes of limitations shall be automatically tolled until the mediator declares an impasse. If either party desires to request the production of information for its use in the mediation, it shall deliver such request to the other party within five (5) days of the selection of the mediator. Any objection to such production shall be delivered to the mediator and the requesting party within five days of receipt of the request, and the mediator shall issue an opinion within five (5) days of such objection, as to whether the information is relevant to the issues presented for mediation and should be produced. If either party refuses to proceed with the mediation in accordance with the ruling of the mediator, the mediation shall be deemed to be at impasse, and the parties may then resort to any other available recourse. In the event mediation occurs but fails to resolve the dispute, the parties may then resort to means outside the scope of this Section including filing suit.

(d) Neither the **City** nor the **Telephone Company** by accepting this Ordinance waives its right to seek all appropriate legal and equitable remedies as allowed by law upon violation of the terms of this Ordinance by the other party, including seeking injunctive relief in a court of competent jurisdiction. Such right to seek injunctive relief is expressly reserved and all terms and provisions hereof shall be enforceable through injunctive relief.

SECTION 15. GOVERNMENTAL IMMUNITY

All of the regulations provided in this Ordinance are hereby declared to be for a public purpose and the health, safety, and welfare of the general public. Any member of the governing body or **City** official or employee charged with the enforcement of this Ordinance, acting for the **City** in the discharge of his duties, shall not thereby render himself personally liable; and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his said duties.

SECTION 16. GRANTING POWER

(a) The **City** continues to take the position that the **City** has the power to grant or deny consent to the **Telephone Company's** occupancy and use of the Rights-Of-Way within the **City**. The **Telephone Company** continues to take the position that Federal law and Texas law do not permit the **City** to deny consent to the **Telephone Company** to occupy and use such Rights-Of-Way. Both the **City** and the **Telephone Company** agree that their actions in entering this agreement by ordinance shall not in any way be a waiver of either party's position as stated herein.

(b) Nothing in this section affects the authority of the **City** to manage the public Rights-Of-Way or to require a fair and reasonable compensation from all telecommunications providers, on a competitively neutral and nondiscriminatory basis, and the compensation will be publicly disclosed by the City.

SECTION 17. INDEMNITY

(a) The **Telephone Company** shall protect, indemnify, and hold the **City** harmless from all costs, expenses (including reasonable attorney's fees) and claims for damages to persons or property arising directly or indirectly out of the construction, maintenance or operation of the **Telephone Company's** Facilities to the extent of the **Telephone Company's** negligence or intentional acts. This provision is not intended to create a cause of action or liability for the

benefit of third parties but is solely for the benefit of the **Telephone Company** and the **City**. The **Telephone Company** reserves the right to select and retain counsel of its choice and at its own expense, without the approval of the **City**, Mayor or Aldermen.

(b) The **City**, Mayor, and the Aldermen specifically reserve the right to retain counsel of their choice, at their own expense. The **City** will promptly notify the **Telephone Company** of any litigation, subpoenas or actions pursuant to which the **Telephone Company's** obligation to indemnify might arise.

SECTION 18. REPEAL OF CONFLICTING PROVISIONS

All other ordinances and agreements and parts of agreements and ordinances in conflict with the provisions of this Ordinance are hereby repealed to the extent of such inconsistency.

SECTION 19. NOTICE

For any purposes related to this Ordinance, notice to the **City** shall be to :

Mayor
City of Highland Haven
510 - A, Highland Drive
Highland Haven, TX 78654

Notice to the **Telephone Company** shall be to:

Associate General Counsel
GTE Southwest Incorporated
P. O. Box 152013
Irving, TX 75062

Notice will be effective upon delivery at the above addresses until the **City** or the **Telephone Company** notifies the other, in writing, of a change of address.

SECTION 20. PARTIAL INVALIDITY AND REPEAL PROVISIONS

If any section, sentence, clause or phrase in this Ordinance is for any reason held to be illegal, ultra vires, unconstitutional, void, or unenforceable such invalidity shall not affect the validity of the remaining portions, it being the intent of the **City** in adopting this Ordinance and the **Telephone Company** in accepting and agreeing to it that no portion hereof or provision hereof shall be inoperative or fail by reason of any unconstitutionality or invalidity or any other portion, provision, or regulation, and to this end, all provisions of this Ordinance are declared to be severable. This Ordinance shall be and is hereby declared to be cumulative of all other ordinances of the **City**, and this Ordinance shall not operate to repeal or affect any of such other ordinances except insofar as the provisions thereof might be inconsistent or in conflict with the provisions of this Ordinance, in which event such conflicting provisions, if any, in such other ordinance or ordinances are hereby repealed to the extent of such inconsistency. All ordinances and agreements and parts of ordinances and agreements in conflict herewith are hereby repealed to the extent of such inconsistency. Provided all other ordinances, rules, regulations, and agreements which are not in conflict with this Ordinance and which in any manner relate to the regulation of the **City** streets, alleys, and public places or the business of the **Telephone Company** shall remain in full force and effect.

SECTION 21. EFFECTIVE DATE AND ACCEPTANCE OF AGREEMENT

The **Telephone Company** shall have sixty (60) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the **City** Secretary. Upon such filing, this Ordinance shall take effect and the effective date of this Ordinance shall be **August 02, 1998**, and it shall be in force from and after such date, and shall effectuate and make binding the agreement provided by the terms hereof. All costs of any publication required by law shall be at the expense of the **Telephone Company** in addition to other charges provided for herein.

SECTION 22. TRANSFER OR ASSIGNMENT

This Ordinance shall not be transferred or assigned by the **Telephone Company** except with the approval of the governing body of the **City** expressed by ordinance and subject to all terms of such ordinance, which shall not be unreasonably withheld.

SECTION 23. OPEN MEETING

It is hereby officially found and determined that the meeting at which this Ordinance is passed is open to the public as required by law and that public notice of the time, place and purpose of said meeting was given as required.

PASSED and APPROVED by the BOARD OF ALDERMEN of the City of Highland Haven, Texas, this _____ day of _____, A.D. 19_____.

MAYOR _____

ATTEST:

City Secretary

APPROVED AS TO FORM:

City Attorney

I, _____, City Secretary of the **City** of Highland Haven, Texas, do hereby certify that the above and foregoing is a true and correct copy of the right-of-way agreement between the **City** of Highland Haven, Texas, and GTE Southwest Incorporated as indicated herein.

City Secretary

ACCEPTANCE

WHEREAS, the BOARD OF ALDERMEN of the **City** of Highland Haven, Texas, did on the _____ day of _____, 19_____, enact an Ordinance entitled:

AN ORDINANCE WHEREBY THE **CITY** OF HIGHLAND HAVEN, TEXAS, AND GTE SOUTHWEST INCORPORATED AGREE THAT, FOR THE PURPOSE OF OPERATING ITS TELECOMMUNICATIONS BUSINESS, THE **TELEPHONE COMPANY** SHALL CONSTRUCT, ERECT, BUILD, EQUIP, OWN, MAINTAIN AND OPERATE IN, ALONG, UNDER, OVER AND ACROSS, THE STREETS, AVENUES, ALLEYS, BRIDGES, VIADUCTS, AND PUBLIC GROUNDS OF THE **CITY**, SUCH POSTS, POLES, WIRES, CABLES, CONDUITS AND OTHER APPLIANCES, STRUCTURES AND FIXTURES NECESSARY OR CONVENIENT FOR RENDITION OF TELECOMMUNICATIONS SERVICES IN SAID **CITY** AND FOR CONDUCTING A GENERAL LOCAL AND LONG-DISTANCE TELEPHONE BUSINESS; **PRESCRIBING** THE CONDITIONS GOVERNING THE USE OF PUBLIC RIGHTS-OF-WAY FOR THE **TELEPHONE COMPANY'S** TELECOMMUNICATIONS BUSINESS; PRESCRIBING THE QUARTERLY COMPENSATION DUE THE **CITY** UNDER THIS ORDINANCE; PROVIDING THE RIGHT OF THE **CITY** TO USE CERTAIN FACILITIES OF THE **TELEPHONE COMPANY**; PROVIDING AN INDEMNITY CLAUSE; SPECIFYING GOVERNING LAWS; PROVIDING FOR ASSIGNMENT; PRESCRIBING THE TERM AND EFFECTIVE DATE OF SAID AGREEMENT; PROVIDING FOR NOTICE; PROVIDING FOR BINDING EFFECT; PROVIDING THAT THE ORDINANCE BE CUMULATIVE; PROVIDING FOR GOVERNMENTAL IMMUNITY; PROVIDING FOR CONSENT AND ACCEPTANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR CHOICE OF LAW AND VENUE; PROVIDING FOR FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW; PROVIDING FOR FUTURE CONTINGENCIES; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR RELEASE OF ALL CLAIMS UNDER PRIOR ORDINANCES; PROVIDING FOR ALTERNATE DISPUTE RESOLUTION; AND PROVIDING FOR METHOD OF ACCEPTANCE;

and

WHEREAS, said Ordinance was on the _____ day of _____, 19_____ duly approved by the Mayor of said **City** and the seal of said **City** was thereto affixed and attested by the **City** Secretary;

NOW THEREFORE, , GTE Southwest Incorporated hereby in all respects accepts, approves, and agrees to said Ordinance, and same shall constitute and be a binding contractual obligation of GTE Southwest, Inc. and of the City without waiver of any other remedy by GTE Southwest, Inc. or the City and files this its written acceptance with the **City** Secretary of the **City** of Highland Haven, Texas, in his office.

Dated this _____ day of _____, A.D. 19_____.

GTE SOUTHWEST INCORPORATED

By: _____
President

ATTEST:

Assistant Secretary

Acceptance filed in the office of the **City** Secretary of **Highland Haven**, Texas, this _____ day of _____, A.D. 19_____.

City Secretary